

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	DETERMINATION
<b>CHARLES W. CODY</b>	:	DTA NO. 818697
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Periods July 1, 1992 through March 31, 1993 and July 1, 1993 through June 30, 1996.	:	

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Petitioner, Charles W. Cody, 63 Parsonage Lane, Topsfield, Massachusetts 01983, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the periods July 1, 1992 through March 31, 1993 and July 1, 1993 through June 30, 1996.

A small claims hearing was held before Arthur Johnson, Presiding Officer, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 21, 2002 at 10:45 A.M., with additional evidence to be submitted by July 15, 2002. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kimberly Powell).

***ISSUE***

Whether petitioner is liable as a responsible person of Metabolic Health Systems, Inc. for a penalty in an amount equal to withholding taxes not paid by the business for the periods July 1, 1992 through March 31, 1993 and July 1, 1993 through June 30, 1996.

***FINDINGS OF FACT***

1. Petitioner, Charles W. Cody, was president and 60 percent shareholder of Metabolic Health Systems, Inc. (“the corporation”).

2. On September 3, 1999, the Division of Taxation (“Division”) mailed the corporation an appointment letter scheduling a withholding tax audit for the years 1992 through 1996. The corporation was selected for audit because employees filed personal income tax returns showing New York State and New York City income taxes withheld and the Division’s records indicated that the corporation had not filed any withholding tax returns. The appointment letter and follow-up letter were returned by the postal service to the Division as undeliverable. Further research by the Division disclosed that the corporation had filed for bankruptcy in 1997. The Division contacted the trustee for the bankruptcy who indicated that he did not have any records for the corporation and had no knowledge of the whereabouts of any records. The Division reviewed the corporation franchise tax returns filed by the corporation for fiscal years ending May 31, 1993, May 31, 1994, May 31, 1995 and May 31, 1996 to determine New York wages paid to employees. Based on said corporation tax returns the Division estimated that New York taxes were 5% of reported wages and New York City taxes were 2% of reported wages. The following sets forth the withholding tax periods at issue and the amounts of New York State and City withholding taxes estimated to be due:

<b>Period Ended</b>	<b>NYS Withholding</b>	<b>NYC Withholding</b>
6/1/92 to 12/31/92	\$4,247.80	\$1,699.12
1/1/93 to 3/31/93	\$2,202.16	\$880.87
6/1/93 to 12/31/93	\$4,404.32	\$1,761.74
1/1/94 to 12/31/94	\$9,121.72	\$3,648.68

1/1/95 to 12/31/95	\$14,889.36	\$5,955.76
1/1/96 to 6/30/96	\$10,325.50	\$4,131.40

3. On June 22, 2000, the Division of Taxation (“Division”) issued ten notices of deficiency to petitioner for the periods and in the amounts indicated above. Separate notices were issued for New York State and New York City withholding taxes.

The notices indicated that petitioner was held liable as an officer or responsible person of the corporation for a penalty in an amount equal to the tax not paid by the business pursuant to section 685(g) of the Tax Law.

4. The Division’s records show that the corporation was formed and began business in New York State in June 1992 and that corporation franchise tax returns were filed through May 31, 1996.

#### ***SUMMARY OF THE PARTIES’ POSITIONS***

5. Petitioner did not dispute that he was a responsible person of the corporation. However, he believes that the amount of the taxes determined due from the corporation are incorrect. Petitioner maintained that the corporation did not have employees in New York until January 1993 and that the corporation ceased all activities in New York as of December 31, 1995. Petitioner stated that he recalled signing checks in payment of New York withholding taxes but the Division has not applied any credit for payments against the assessments. Petitioner argued that the corporation had accounts receivable of three and one-half million dollars when it filed for bankruptcy and such funds were sufficient to pay any taxes due the State had the Division promptly notified the corporation of its failure to file withholding taxes. Petitioner stated that the records are no longer available to prove that the notices are in error. At the time of filing for bankruptcy, the corporation placed all its records in storage at a facility in

Massachusetts. The trustee in bankruptcy failed to pay rent to the landlord for the storage and consequently the landlord discarded the records.

6. The Division took the position that the corporation failed to file withholding tax returns and therefore, it properly estimated the taxes due from the corporation based on wages reported on franchise tax returns filed for the years 1992 through 1996. The Division argued that since petitioner did not dispute his status as a responsible person of the corporation, he is liable for penalties equal to the withholding taxes not paid by the corporation.

### ***CONCLUSIONS OF LAW***

A. In this proceeding there is no dispute that petitioner is a person under a duty to collect, truthfully account for and pay over the New York State and City income taxes withheld from the wages paid by Metabolic Health Systems, Inc. (Tax Law § 685[n]). As such, petitioner is liable for a penalty, imposed pursuant to Tax Law § 685(g), equal in amount to the unpaid taxes.

B. Tax Law § 689(e) places the burden of proof on petitioner to show that the deficiencies issued to him were erroneous. The penalties assessed against petitioner were equal to the withholding taxes estimated by the Division to be due and unpaid by the corporation. In the absence of any books and records, it was reasonable for the Division to base its estimate on the wages reported by the corporation on the franchise tax returns filed for the periods at issue. In the instant matter, petitioner failed to sustain his burden of proof to show that the withholding taxes determined due by the Division were erroneous or that the corporation filed or made payments of withholding taxes which had not been applied to the taxes due.

C. The petition of Charles W. Cody is denied and the notices of deficiency issued June 22, 2000 are sustained.

DATED: Troy, New York  
October 10, 2002

/s/ Arthur Johnson  
PRESIDING OFFICER